

# Exhibit F

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1 UNITED STATES DISTRICT COURT  
1 SOUTHERN DISTRICT OF NEW YORK

2 -----x

2  
3 MONIQUE DA SILVA MOORE, et  
3 al.,

4  
4 Plaintiffs, New York, N.Y.

5  
5 v. 11 Civ. 1279 (RJS)

6  
6 PUBLICIS GROUPE, and MSL  
7 GROUP,

7  
8 Defendants.

8  
9 -----x

9  
10 December 14, 2012  
10 11:05 a.m.

11  
11 Before:

12  
12 HON. ANDREW J. PECK,

13  
13 U.S. Magistrate Judge

14  
14 APPEARANCES

15  
15 SANFORD WITTELS & HEISLER  
16 Attorneys for Plaintiffs  
16 BY: THOMAS J. HENDERSON  
17 SUSAN RUBENSTEIN  
17 SIHAM NURHUSSEIN

18  
18 JACKSON LEWIS LLP  
19 Attorneys for Defendant MSL Group  
19 BY: VICTORIA WOODIN CHAVEY  
20 JEFFREY W. BRECHER  
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22 MORGAN LEWIS & BOCKIUS LLP  
22 Attorneys for Defendant Publicis  
23 BY: PAUL C. EVANS

24  
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1 (In open court)

2 (Case called)

3 THE COURT: First of all, with respect to

4 Mr. Henderson, I signed the pro hac order this morning. You  
5 all should have it on your ECF hits if you get them on your  
6 BlackBerrys, or, if not, when you get back to your office.

7 MR. HENDERSON: Thank you very much, your Honor.

8 THE COURT: Welcome aboard.

9 As to the issue of class action discovery, I have at  
10 least skimmed Ms. Rubenstein's letter. I read the letter.  
11 It's the attachments that were skimmed. I have some thoughts  
12 on it, but let me hear from the defense first.

13 MS. CHAVEY: Thank you, your Honor.

14 It appears from the proposed discovery plan that the  
15 plaintiffs submitted to the Court yesterday that they really  
16 are anticipating full-blown discovery that's not limited in any  
17 way to class certification issues.

18 They appear to seek to revisit many of the things that  
19 have already been discovered and that this Court has ruled on  
20 at some length, including HR data, policy documents, HR  
21 complaints and many other categories. But the breadth and  
22 depth of the written discovery requests that are proposed  
23 appear to contemplate class certification, discovery that would  
24 be combined with and enmeshed with discovery on the merits of  
25 the class claims.

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1 As to the depositions that are proposed --

2 THE COURT: Forget the depositions.

3 MS. CHAVEY: OK.

4 THE COURT: For now.

5 OK. Mr. Henderson or Ms. Rubenstein?

6 MR. HENDERSON: Yes. Good morning, your Honor.

7 I would like to say first I spent much of the last two  
8 weeks trying to get up to speed trying to understand where  
9 things are and to try to find a way forward here. It's in  
10 plaintiff's interest to move this case forward and get the  
11 discovery complete and get the record prepared for Judge  
12 Carter.

13 THE COURT: With all due respect, the letter that was  
14 submitted on the 7th that said we are going to want some  
15 limited discovery and then what came in on the 13th are like  
16 they were written by two different people.

17 MR. HENDERSON: One of the things I have tried to do,  
18 your Honor, coming into this situation is to try to see what's  
19 feasible going forward, what agreements actually we may be able  
20 to reach with counsel for the other side, and to the extent we  
21 can't resolve everything, to the extent which we can narrow  
22 them.

23 I would like to report a little bit on what we have  
24 done and what I think are some areas that actually do suggest  
25 possible agreement at least in terms of limiting the issues

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1 that might have to be decided.

2 THE COURT: Does that mean there was discussion post  
3 the December 13 letter that came in I guess at 4:30 yesterday,  
4 or is that letter totally unrelated to whatever quote-unquote  
5 agreements there are?

6 MR. HENDERSON: Let me say that we have spoken at  
7 least three times over the last week and a half. And with  
8 respect to Publicis' counsel, since Judge Carter has now --

9 THE COURT: Let's skip them.

10 MR. HENDERSON: If I might just very briefly say this,  
11 I think you might be encouraged, your Honor.

12 THE COURT: OK.

13 MR. HENDERSON: We have consulted with counsel for  
14 Publicis about what discovery we think might be necessary with  
15 respect to them. We have agreed to continue to meet and confer  
16 to try to reach some agreement on what would be required with  
17 regard to discovery for Publicis, so I wanted to report that to  
18 you.

19 THE COURT: OK.

20 MR. HENDERSON: Secondly, your Honor, we have  
21 consulted with MSL regarding the whole situation of bifurcation  
22 or not and what is appropriate class discovery. As you may  
23 note from the letters earlier, we sent them a proposal that we  
24 thought was the appropriate scope of class discovery. We had a  
25 conversation about that. We didn't get particularly a response

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1 as to any of those that they agreed or disagreed would be class  
2 discovery, but they then proposed their own sort of discovery  
3 plan, which is I think in Exhibit 2 of their letter of December  
4 7, which we thought was very asymmetrical in terms of limiting  
5 plaintiff's discovery and yet they would have full discovery  
6 with regard to the EPA merits of all the intervenors -- or the  
7 opt-ins, I'm sorry. But I don't know that we're finished  
8 discussing either. We got your order, and we have responded to  
9 your order.

10 THE COURT: Time out.

11 First of all, just to bring you up to date on a rule  
12 that you may not have read, if I talk, you stop.

13 That's rule number one in my court at all times.

14 MR. HENDERSON: Certainly, your Honor.

15 THE COURT: It may not be fair, it may not be polite,  
16 but I have a heavy docket and everything you have just said is  
17 information I know.

18 The problem I have -- and, look, I have sort of given  
19 up keeping this case moving quickly because you all don't want  
20 to between the two sides, and I won't say which side I think is  
21 more or less at fault. You are both at fault. If I asked you  
22 is today Friday, December 14, I would get four letters  
23 explaining why it isn't or isn't and why six other issues  
24 impact on that.

25 My problem is this. Your December 7 letter,

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1 regardless of the approach they took, which also was indeed one  
2 sided, said we need some very limited policy documents then we  
3 will take some depositions and then we can move for class cert.  
4 I said great. Now let's put some teeth on it.

5 What I received yesterday is full merits discovery, or  
6 if not full merits discovery, it is so deeply into the merits  
7 that there is no point in doing it twice unless -- and frankly  
8 I'm tempting to say I will take the approach that the Eastern  
9 District of Pennsylvania or whatever district of Pennsylvania  
10 it was took in Boeynaems v. LA Fitness and say, you want  
11 certain class discovery, you can have a lot of what you want,  
12 you are going to pay for it all, including their lawyer time,  
13 to find the material.

14 This request is absurd. So if you all want to try to  
15 meet and confer and come back in January early we can do that.  
16 Frankly, you are all not going to do much work between now and  
17 the beginning of the year producing documents anyway.

18 MR. HENDERSON: If I might, your Honor, and that may  
19 be a wise outcome of this today, but I was going to try to get  
20 to what I thought were some areas of agreement, at least  
21 narrowing issues.

22 I read again last evening Ms. Chavey's letter of  
23 December 7, and I was struck at the bottom of page 2 and the  
24 top of page 3 that in this letter MSL is proposing that  
25 discovery be focused on the existence and validity of the class

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1 issues, that is, whether the requirements of Rule 23 are  
2 satisfied and the merits of the class period, because the  
3 merits and class certifications are intertwined.

4 We agree with that, your Honor. I don't think, to be  
5 honest with you, and we had discussions about this, there may  
6 be some theoretical way to separate class certification issues  
7 appropriate under Rule 23 from the merits of the class claim  
8 issues, but in practice, your Honor, it is just impossible to  
9 do. That has been made all that much more difficult by reason  
10 of this Supreme Court's decision in Dukes, which clearly says  
11 as a part of the Rule 23 --

12 THE COURT: Basically you are saying let's forget it  
13 and not do class discovery, let's do full-blown merits and  
14 class discovery.

15 Is that what you are telling me?

16 MR. HENDERSON: What I am saying is this, MSL's  
17 counsel suggested that discovery should be focused on class  
18 certification.

19 THE COURT: Mr. Henderson, with all due respect, when  
20 I ask a question, I like an answer. When I ask a question that  
21 is capable of a yes or no answer, I like a yes or no. Forget  
22 what they are saying, because you two can't agree on anything,  
23 and you are purporting to say you agree with them when, if you  
24 are saying you want full merits discovery, you are disagreeing  
25 with them.

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1 So yes or no. Do you want to try to bifurcate or you  
2 don't?

3 MR. HENDERSON: I believe that the bifurcation that we  
4 would propose is different than what the Court has thought  
5 about and what the defendants have thought about.

6 THE COURT: That is for sure.

7 MR. HENDERSON: I would be happy to articulate that if  
8 you would like, how we see bifurcation, the differences between  
9 our view of bifurcation and others.

10 THE COURT: OK.

11 MR. HENDERSON: If you think about how a pattern and  
12 practice case gets tried, there is a two-stage trial, a  
13 two-stage process. Basically it's been outlined in the  
14 Teamsters decision in the Supreme Court. The first stage of  
15 the trial is class-wide liability. So the only issues that get  
16 tried in phase 1 are class-wide liability issues.

17 The Court decides then if there is a pattern and  
18 practice or not, and, if so, if there is appropriate injunctive  
19 relief. If there is a finding of liability, that then leads to  
20 stage 2 proceedings. Stage 2 proceedings are then the  
21 defendants have the opportunity -- the class members have the  
22 opportunity to advance, assert their claims for individual  
23 relief, and the defendants have the opportunity to oppose  
24 those.

25 There is a presumption in favor of the class members,  
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1 but that presumption is rebuttable, and the defendants are  
2 entitled to contest the individual class members' entitlement  
3 to relief. The bifurcation that we are talking about as we see  
4 it would match that. So the first stage of the trial --

5 THE COURT: You are not talking trial. Unless both  
6 sides are willing to waive summary judgment motions -- look,  
7 the reason we got into this, and I appreciate your catching up  
8 but I'm getting a little upset that I've got a rotating cast of  
9 characters, and I'm coming very close to saying lead trial  
10 counsel must be at all court hearings.

11 Now I don't know if that's going to be one of you two  
12 or whether that's Ms. Wippel in San Francisco, but the issue I  
13 raised twice in this litigation, and this time I'm serious  
14 about it, is that you can't have a schedule that says let's do  
15 all discovery, then defendants are going to move for summary  
16 judgment, and you are going to move for class certification at  
17 the same time, which means if summary judgment is granted for  
18 the defense, you are then going to say, well, it only binds the  
19 five people here because there hasn't been certification or  
20 whatever.

21 That doesn't seem to work, which is why, even though  
22 you all convinced Judge Sullivan of that many years ago, I said  
23 at the beginning of my involvement in the case I didn't think  
24 that made sense. I could not get your predecessor counsel from  
25 your firm to agree to that, and I was sort of stuck with what

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1 Judge Sullivan had ordered.

2 When you all came back last time with Dr. Lewis and  
3 all ready to start heading into the weeds of predictive coding  
4 again, I said, look, I want to make sure that you're not  
5 getting full class discovery as if the class were certified,  
6 because the class hasn't been certified, nor do I want to have  
7 to do discovery again. So that if you are doing merits slash  
8 should the class be certified discovery now and then you are  
9 going to say once the class is certified then you need a lot  
10 more discovery, I am not doing that.

11 If you want to say that because of Dukes and the  
12 Teamster case and all of that you want enough merits-related  
13 discovery for the merits of the five named plaintiffs and  
14 whatever you do to amend the complaint on behalf of the  
15 opt-ins, which has been discussed, and that if class cert. is  
16 granted, at that point there will be no other discovery, I  
17 might be convinced to go back to that. But I'm tired of, in  
18 the words of my friend Paul Grimm, you want everything and a  
19 pony at all times.

20 MR. HENDERSON: May I respond, your Honor?

21 THE COURT: Yes.

22 MR. HENDERSON: First, I think you can be assured that  
23 lead counsel is going to be Ms. Rubenstein and myself, number  
24 one.

25 Number two, I have been asked to get involved in this  
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1 specifically to resolve these class issues and move it forward.  
2 That is why I'm here today, your Honor.

3 Secondly, I think to try to directly answer your  
4 question, the bifurcation that we're proposing really says, we  
5 propose to do all class discovery associated with the issues  
6 related to Rule 23 certification and the merits of the class  
7 claims.

8 THE COURT: OK. Well that's not bifurcation.

9 MR. HENDERSON: It is to this extent, your Honor.  
10 Please let me disabuse you.

11 THE COURT: OK.

12 MR. HENDERSON: What I'm basically saying is when we  
13 are done with that discovery and we move for class  
14 certification, and MSL has indicated that they would be  
15 interested in moving for summary judgment on the class claims,  
16 not the individual claims, which is fine, they can do that, and  
17 the Court can have before it both the certification question  
18 and their summary judgment motion would say there is not enough  
19 evidence to make out a pattern and practice case, therefore  
20 summary judgment in their favor.

21 Those two motions are not incompatible. They could be  
22 before Judge Carter. What I am saying is when that is done, as  
23 far as plaintiffs are concerned, if we get full merits class  
24 discovery, then we will not really have need of any further  
25 discovery. There may be a few issues that come up during the

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1 briefing or class certification decision that the Court says we  
2 should look at --

3 THE COURT: Basically, so there's no bifurcation is  
4 what you are saying.

5 MR. HENDERSON: The bifurcation is this, your Honor.  
6 If there is a finding of class-wide liability, then the  
7 defendants are entitled to discovery as to the claims of the  
8 individual absent class members.

9 In other words, if there is a finding of --

10 THE COURT: So no discovery on your behalf, only  
11 whatever discovery is asserted against you?

12 MR. HENDERSON: I mean, well, to the extent they want  
13 to contest the claims of individual class members for  
14 individual relief, as I said, the Teamsters model says there's  
15 a presumption for the class member and basically the defendants  
16 can contest.

17 But those often, your Honor, are in stage 2  
18 proceedings that are, as I think I indicated or I read in one  
19 of the transcripts, sometimes there are agreements about how  
20 those proceedings are going to be handled. But my point is  
21 that is very, very narrow discovery limited to the facts  
22 relevant to the individual absent class members' claims for  
23 relief.

24 THE COURT: Well, that's not what you said in the  
25 December 7 letter, and this is just not acceptable to the

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1 Court.

2 So we are going to do either policy oriented discovery  
3 or we are going to do all discovery with a significant either  
4 cost shift or cost cutoff, and you can't have discovery as if  
5 this is a class action, period.

6 So you decide, but either your position shifted in the  
7 last week or somebody doesn't know how to write clearly,  
8 because I certainly did not anticipate this position from the  
9 December 7 letter. This is a total reversal of your position,  
10 and I'm tired of your wasting the Court's time.

11 MR. HENDERSON: Your Honor, I understand your  
12 frustration. I simply want to say to you that we proposed this  
13 as a way to get discovery done, to get the record prepared for  
14 the class proceedings before Judge Carter.

15 THE COURT: With all due respect, tell me how that is  
16 consistent with your December 7 letter.

17 MR. HENDERSON: We were making efforts in response to  
18 your instructions to try to identify what discovery  
19 specifically we would need for class certification. If you  
20 look, your Honor, it included both of our proposals --

21 THE COURT: Everything in Exhibit A to your letter,  
22 plaintiff's proposed discovery plan targeted for class  
23 certification, put aside the cover letter, promotion, updated  
24 policies, recruitment, hiring policies, pregnancy, updated  
25 maternity leave, etc., policies, everything seems policy; and

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1 then the interpretation issues you said, well, we'll figure  
2 that out after the 30(b)(6) depositions. Now when I say,  
3 great, let's put teeth on that, I get a letter that says you  
4 want everything and a pony and a zoo now.

5 So you are wasting my time. I'm not happy. And the  
6 answer is going to be if you want merits discovery, you can  
7 have merits discovery limited to the issue of class  
8 certification, not every individual who was ever promoted or  
9 anything like that. And we'll go back to the predictive coding  
10 world, and there will be no additional discovery at the end of  
11 it, period.

12 Is that what you want?

13 MR. HENDERSON: Your Honor, may I respond?

14 THE COURT: Yes.

15 MR. HENDERSON: I think there is a fundamental issue  
16 that hasn't been -- well, the difficulty, the fundamental  
17 difficulty is what one says is appropriate merits class  
18 discovery.

19 THE COURT: I guess you changed your mind on that  
20 between the 7th and the 14th.

21 MR. HENDERSON: Actually not, your Honor. But let me  
22 explain first, and then I can address whatever differences  
23 there are.

24 THE COURT: OK. First, stop. One thing. The only  
25 trial counsel will be the three of you who are here. Is that

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1 what you are telling me? Because I'm tired of the changing  
2 cast of characters, the changing position. So if Ms. Wippel  
3 wants to be trial counsel instead of pulling the strings from  
4 California, if that's what's going on, then we can come here.  
5 Otherwise, I don't want anything submitted from her. I don't  
6 want her to be here at trial if the case gets that far or I do  
7 want her here.

8 But I have the feeling that between the departure of  
9 your former named partner, I don't know what's going on, but  
10 things keep changing, and enough is enough.

11 So are the two of you the only partner level -- and  
12 I'm not even sure you are partners from your cards, I don't  
13 really care -- are you two the ones who are going try the case  
14 with Ms. Nurhussein, and that's it? Yes or no.

15 MR. HENDERSON: Yes. We may be joined by some others,  
16 but we are going to be lead counsel.

17 THE COURT: OK. And Ms. Wippel, who I would assume is  
18 senior to you, is not going to be here at trial or she is?

19 MR. HENDERSON: At this point we do not contemplate  
20 that she would be. It's Wipper.

21 THE COURT: Wipper. Sorry. It's been a while.

22 OK. Her pro hac vice is therefore ended. No more  
23 papers from her, no more ghost writing. You two are in charge.  
24 Write it.

25 OK. Now that we have taken care of that, now you tell  
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1 me what you want. Forget how we got here. Tell me what you  
2 want.

3 MR. HENDERSON: Thank you, your Honor. I was trying  
4 to make the point about what is merits, class-based merits  
5 discovery. The problem, your Honor, is and we tried to reflect  
6 this in the outline we sent, but what we need is discovery with  
7 regard to the manner in which the company treated the members  
8 of the class as a whole.

9 THE COURT: That is merits discovery.

10 MR. HENDERSON: It is. Well, it's on the class plan.

11 THE COURT: OK. So there can't be bifurcation is what  
12 you are telling me?

13 MR. HENDERSON: Between certification and merits, yes,  
14 on the class issues.

15 THE COURT: Let me be clear.

16 Without a class certified, you will get certain  
17 discovery which we had previously discussed. You will not get  
18 discovery about what happened at offices outside the ones where  
19 you've got named plaintiffs or any of the other things because  
20 what you are trying to do is have your cake and eat it, too.

21 So if you want full discovery, there will be one round  
22 of discovery, predictive coding, whatever else needs to be done  
23 it will do it once and not again. If that is what you want,  
24 that is what I will allow, even though I think it is not the  
25 best way to do it. But I'm really tired of the way you are

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1 handling this.

2 MR. HENDERSON: May I ask for a clarification, your  
3 Honor.

4 THE COURT: Yes.

5 MR. HENDERSON: With respect to the discovery that --  
6 I have described what we need for class merits discovery. The  
7 problem is, your Honor, that I think we share here is that  
8 there needs to be a record for the Rule 23 ruling so Judge  
9 Carter can make a decision. That record has to be adequate so  
10 that he can support that decision and has the record to make  
11 the findings that he needs to make under Rule 23.

12 We have the burden of proving Rule 23 criteria,  
13 including showing not just the policies and the outcomes, the  
14 statistics, but we have the burden to show, the Supreme Court  
15 says it includes how the policies connect or cause or create  
16 the disparities. To do that, as we indicated here, we need  
17 discovery with regard to how those policies were interpreted,  
18 how they were applied and how they were implemented with regard  
19 to the class.

20 THE COURT: You are going to get through that  
21 depositions. I am not giving you discovery of everybody who  
22 was promoted over whatever is the statute of limitations period  
23 until there is class certification.

24 So you want to do it your way, we'll do it your way.  
25 But I am not giving you full-blown discovery as if the class

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1 were certified.

2 MR. HENDERSON: May I address that for a moment, your  
3 Honor.

4 THE COURT: No. At this point enough is enough. Take  
5 it to Judge Carter and let him decide.

6 If you don't want to bifurcate in a way that is  
7 meaningful because of the overlap with merits, let me ask you  
8 this: Looking at your document demands here, how is it you  
9 expect them to find this? Are we having one predictive coding  
10 round as to the quote-unquote merits/class discovery, and after  
11 we have spent a few million bucks on that then we will do it  
12 again for everything?

13 MR. HENDERSON: No, your Honor. In fact, I would  
14 suggest that that is in fact the thing which will -- I read the  
15 transcript. I know you're concerned about doing it twice. The  
16 thing which is going to cause it to have to be done twice, your  
17 Honor, is if you limit it only to the named plaintiffs the  
18 first time, then it's going to have -- if the class is  
19 certified, then it's going to be redone.

20 THE COURT: We are not doing it twice. Read my lips.

21 MR. HENDERSON: I understand. But what I am  
22 suggesting --

23 THE COURT: No, you are not understanding, so let me  
24 take out the verbiage. How do you expect -- let's take a look  
25 at number D on your thing under pay.

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1 All documents, including all e-mails, instant  
2 messaging, or other electronic communications reflecting or  
3 related to policies and implementation of policies and  
4 decisions about compensation for PR professionals at MSL Group.

5 How do you want them to find those documents, and by  
6 documents I'm including ESI. Seriously.

7 MR. HENDERSON: I believe, your Honor, this is done  
8 routinely in class action.

9 THE COURT: Counsel, answer the question. How is it  
10 you want them to find it? Predictive coding, key word  
11 searches, throwing things up in the air and seeing what falls  
12 to the floor?

13 I mean, what?

14 MR. HENDERSON: What we proposed, to try to be able to  
15 focus a little bit on this, this is the 30(b)(6) proposal that  
16 we had, that we would take 30(b)(6) depositions in each of  
17 these policy areas and HR so that we can in the course of those  
18 30(b)(6) depositions identify the documents that are associated  
19 with the these policies and how they are administered and  
20 implemented and any data that is generated in the company.

21 So we then have knowledge as to what the universe of  
22 documents are that would be relevant to those policy issues.

23 THE COURT: Your folks worked at the company. If they  
24 don't know how to identify documents, maybe we do this another  
25 way.

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1 Maybe you would get to take a 30(b)(6) deposition, we  
2 go back to good old ancient New York practice, Rios v. Donovan,  
3 New York State practice, where you have to take a deposition,  
4 identify a document specifically, and then you get to ask for  
5 that document.

6 MR. HENDERSON: Well, your Honor, our proposal was to  
7 try to identify the types of documents, the categories of  
8 documents that are associated with, that are generated by these  
9 policy and practices so we could then all speak more  
10 intelligently about precisely what --

11 THE COURT: Do you really not know that from your  
12 clients?

13 MR. HENDERSON: Your Honor, the clients worked there.  
14 They didn't run the place. And the point is, in employment  
15 cases, it is always the case that the employer knows what the  
16 documents are and the employees do not.

17 So it's long been recognized in these cases that the  
18 defendants have access to all the information and the  
19 plaintiffs don't. We are trying to propose this 30(b)(6)  
20 approach as a way of identifying categories of documents that  
21 then reasonably we could identify.

22 THE COURT: You have a lot of those document  
23 categories here not identified as dependent on a 30(b)(6)  
24 decision.

25 So let's move down to pregnancy for a moment.

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1 Page 3, your letter, 3A: All documents, including all  
2 e-mails reflecting or relating to policies and implementation  
3 of policies regarding family medical leave and pregnancy leave  
4 at MSL.

5 policies I understand.

6 If implementation means every time someone asked for  
7 pregnancy leave you got to have every communication about it,  
8 then that's well beyond, and maybe that is not what you meant,  
9 but what do you mean about reflecting or relating to  
10 implementation of policies?

11 MR. HENDERSON: So what are the documents associated  
12 with the process that the company has for receiving and  
13 addressing requests for leave.

14 THE COURT: That is not an all-documents request, is  
15 it? If you want to know, you know, what form does somebody  
16 have to fill out to get pregnancy leave and what does the form  
17 look like that comes back in response, that is either a  
18 document sufficient to show or it's a deposition. I don't know  
19 what you all were thinking when you wrote this. That's what  
20 gives me the greatest difficulty.

21 Next page, page 4, C, the fourth bullet: All  
22 documents that reflect, discuss, refer or relate to the  
23 flexible schedule plaintiff O'Donohue worked from 1996 until  
24 termination.

25 That is a class request?

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1 MR. HENDERSON: She is a named plaintiff, your Honor.

2 THE COURT: I understand that. This is class

3 discovery that you say you want. What on earth are we doing  
4 here?

5 MR. HENDERSON: She is a class rep, your Honor, so it  
6 would be appropriate discovery for the class certainly.

7 THE COURT: Why? It's the merits --

8 MR. HENDERSON: Because one of the issues before the  
9 Court on Rule 23 is typicality, for example, and adequacy of  
10 representation.

11 We've got to be able to speak to these individual  
12 plaintiffs vis-a-vis the class.

13

14 THE COURT: Basically it's full discovery about the  
15 named plaintiffs and partial discovery as to the merits of the  
16 absent class members. And how much money is this going to cost  
17 and how much are you willing to pay? Are you willing to pay  
18 for all of this? Let's go the Boeynaems route maybe.

19 MR. HENDERSON: I don't believe that cost shifting is  
20 appropriate with respect to class discovery.

21 THE COURT: Of course not. The Court did it in  
22 Boeynaems, the LA Fitness case. I assume since it is your  
23 industry and that is plaintiffs' class action cases, you're  
24 probably familiar with it, are you?

25 MR. HENDERSON: I am not specifically familiar with

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1 that decision, your Honor.

2 THE COURT: OK.

3 MR. HENDERSON: If I might --

4 THE COURT: Do you want to try this? Do you want to  
5 try for the policy-related documents followed by a very limited  
6 number of 30(b)(6) depositions, plus whatever you have already  
7 gotten, which on pay was quite extensive. And I don't think  
8 there's going to be an argument that you need to update it  
9 constantly. You the details for most of the class period.  
10 That is enough. You have an extensive amount of information  
11 that you used for the collective action.

12 Yes, the standard is different for Rule 23, but you  
13 don't need to update everything you had there.

14 So if you want to try for the policy documents and a  
15 small number of 30(b)(6) depositions, that may then get to  
16 limited discovery on implementation of policies. That's what I  
17 was figuring you were doing. Is that something that you want  
18 to pursue?

19 MR. HENDERSON: Your Honor, if I understood you to say  
20 that that we would only have a limited number of 30(b)(6)  
21 depositions that we could take and we would be limited to  
22 policy documents and we would not get documents, for example,  
23 communications about the interpretation of those policies or  
24 how they were implemented, how those policies are administered  
25 across the class, then we could not agree to that, your Honor,

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1 because we would have to have evidence as to how the company  
2 treated the class as a whole in order to meet our burden on  
3 Rule 23 certification and to prove the merits of the case, on  
4 the class claims, not the individual claims, but the class  
5 claims.

6 THE COURT: Then there is no point in bifurcating. If  
7 you don't want to bifurcate, you get one round of discovery,  
8 and that's it, and you don't get it as to, you know, absent  
9 class member specific information. You get a certain amount of  
10 policy implementation and that's it.

11 If you want to go to Judge Carter and get this  
12 clarified by him before we go down an expensive road, that is  
13 fine. But I am not doing this twice. I am not doing it twice.

14 MR. HENDERSON: Your Honor, we don't want to do it  
15 twice either. I just want to be clear.

16 THE COURT: You do, but that is OK.

17 MR. HENDERSON: We actually do not, your Honor. If I  
18 haven't made that clear, I need to. But we do not want to do  
19 merits discovery twice.

20 THE COURT: Right.

21 MR. HENDERSON: The only discovery, as I've indicated  
22 today, that we think would need to be done after class merits  
23 and class certification discovery is discovery regarding  
24 individual claims if the pattern and practice is proven.

25 THE COURT: There is not going to be additional

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1 discovery. So you figure out how to get where you want to go.

2 MR. HENDERSON: If I might raise one other thing, your  
3 Honor, because I think we ought to have this on the table as a  
4 part of the discussion. One of the proposals as well from MSL  
5 we understand at least tentatively, I don't want bind Mr. Evans  
6 to this because we just had an initial discussion with  
7 Publicis, because they have both indicated that they believe  
8 that they want and are entitled to take, to do full discovery  
9 full merits discovery with each --

10 THE COURT: What they want really doesn't matter  
11 because what you want is full merits discovery, so I guess  
12 that's what we are doing.

13 MR. HENDERSON: I was trying to come to a point of  
14 potential agreement, your Honor. I'm anxious to get those out  
15 where we can. I know you would like to hear about them where  
16 they exist.

17 THE COURT: OK.

18 MR. HENDERSON: They have proposed full merits  
19 discovery with regard to the 26 opt-in EPA plaintiffs, with the  
20 Equal Pay Act claims, including depositions. We were just at a  
21 hearing in front of Judge Carter, and they described also that  
22 they that would involve deposition of comparators, document  
23 discovery, e-mail discovery and so forth with regard to those  
24 26 opt-in plaintiffs.

25 We could take the position that that should be

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1 deferred, there are also putative class members and so forth.  
2 But we are willing to agree that that discovery could go ahead  
3 along with what we would request to be the class merits  
4 discovery. So we are prepared to agree to that with the other  
5 side's --

6 THE COURT: With all due respect, that's meaningless,  
7 because unless -- and I will now hear from the defendants --  
8 unless somebody comes up with an appropriate way to limit the  
9 class-related merits discovery so it is not all the merits  
10 except for eventual damages as to particular, as to everybody  
11 in the class, then it seems to me you are going to do  
12 full-blown discovery, period.

13 So let me hear from the defense.

14 Thank you.

15 MR. HENDERSON: Thank you, your Honor.

16 MR. BRECHER: Thank you, your Honor.

17 I think that the biggest difficulty that we are having  
18 is the inability to articulate exactly what the class theory is  
19 so that we can target the discovery to that theory. If the  
20 theory is that the company discriminated against every woman in  
21 every sort of way, then there is no ability to bifurcate or  
22 limit the discovery.

23 If the discriminatory policy or practice is a written  
24 policy that they are saying has been implemented in a  
25 discriminatory way, we could target the discovery to that

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1 policy: It's the FMLA policy, it's the mission critical  
2 reports, it's the approval process for bonuses. But that is  
3 not what they are alleging. They haven't articulated any class  
4 theory to permit the Court to direct the discovery to that  
5 theory. That's the problem that we are having.

6 So when we keep saying class issues, we are going to  
7 have discovery as to class issues, we can't identify it because  
8 there's no theory.

9 We all agree there should be class certification  
10 discovery, but when we can't articulate what the theory is, we  
11 can't articulate or identify what the discovery should be. And  
12 that's where this case has been a problem from day one.

13 THE COURT: What is the class theory?

14 MR. HENDERSON: Your Honor, it was a 95-page very  
15 specific complaint and there has already been conditional  
16 certification of the EPA claims.

17 After this amount of time I think it is a bit  
18 difficult to understand why defendants keep asking what the  
19 theory of the case is. We have been very clear that it is  
20 promotion policy, it is compensation policies -- I'm sorry,  
21 compensation, promotion, and hiring and when hiring is used and  
22 when promotion is used to fill vacancies, and the  
23 administration of the company's policies regarding pregnancy.  
24 We say those policies and the way in which they have been  
25 administered by a very close, small group of decision makers,

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1 discriminates against women.

2 I don't know how to be any clearer about it than to  
3 say, as we go on -- I mean, there are not too many 95-page  
4 complaints that I have seen, your Honor. But my point is we go  
5 on at length as to the policies in general, how they were  
6 administered, how they were applied, and how they have been  
7 applied in particular to the named plaintiffs.

8 So I am at a loss as to how it is the defense counsel  
9 cannot figure out what the claims are. We have been very clear  
10 about it.

11 THE COURT: Go ahead.

12 MR. BRECHER: Judge, the length of the complaint  
13 doesn't add any clarity to it.

14 What he just articulated, promotion policies,  
15 compensation, hiring, administration of pregnancy, that's the  
16 theory? That's the class theory. How are we to target  
17 discovery to those things. That would mean every promotion,  
18 every hiring, every compensation decision, every decision  
19 relating to pregnancy. That's why we are going in this circle  
20 back and forth, because we can't articulate a theory, target  
21 the discovery to the theory and move the case along.

22 THE COURT: OK.

23 MR. BRECHER: If his explanation clarified for the  
24 Court, I must be missing something. It doesn't clarify it for  
25 me. It is vague, and that's the problem with the discovery.

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1 THE COURT: The Court orders as follows:

2 We are going to bifurcate in my way, subject to your  
3 taking objections to Judge Carter. So you can have document  
4 discovery, including ESI, as to policy documents and  
5 implementation, interpretation if it is from that so-called  
6 senior management group on a general basis. In other words,  
7 not, you know, Irene Adler applied for pregnancy leave, let's  
8 make sure to fire her; but our pregnancy leave policy is X, we  
9 interpret X to mean X, you know, or X plus 1. That's what you  
10 get.

11 You could then take a limited number of 30(b)(6)  
12 depositions, one HR, one senior exec, and I'll let you tell me  
13 that perhaps you need one more two more. If you can identify  
14 other specific types of documents beyond what you already have,  
15 I will consider granting you that.

16 So you will do a new document request. How soon?  
17 Comporting with what I have just ordered, we are going to say a  
18 very limited time period to get this done and get the class  
19 certification motion in front of Judge Carter.

20 MR. HENDERSON: Your Honor, I am a little unclear on  
21 the last part. You said propound new requests. Would that be  
22 after the 30(b)(6)'s, your Honor?

23 THE COURT: No. Whatever policy documents you want  
24 now, I want specific requests limited to that, and if you go  
25 beyond it, they are going to object, and I'm not going to parse

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1 it. If you go beyond what I have just allowed you to take at  
2 this point and if you have a request that's overly broad, I am  
3 not going to narrow it, I'm not going to interpret it, I'm  
4 going to say the objection is sustained.

5 Can you get that done within a day? A week? What?  
6 Because that will start their time, you will get the documents  
7 responsive to it within 30 days, no extensions, and we will  
8 start the 30(b)(6) depositions and then we will see if any  
9 supplemental document requests are appropriate.

10 MR. HENDERSON: I see.

11 After 30(b)(6)'s there would be another opportunity if  
12 appropriate?

13 THE COURT: You can't ask for it if you don't know  
14 what to ask for. You have said you don't know what to ask for  
15 in specific terms other than when you talk to the 30(b)(6)  
16 witness. If you want to try talking to your clients and know  
17 that for pregnancy leave they've have to file form PG-1 and you  
18 want some samples of that or something, whatever, but not the  
19 sort of requests that are in your December 13 letter.

20 MR. HENDERSON: Just so I understood, you gave an  
21 example, I think to clarify what you meant, where you said  
22 implementation or interpretation documents --

23 THE COURT: If it is a high level and general  
24 interpretation. Not we interpret Ms. Adler -- and I'm using  
25 names from the Sherlock Holmes canon, you may or may not have

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1 figured that out, fictitious names -- Ms. Adler applied for  
2 pregnancy leave, our policy is X, but in her case it's Y, no.

3 The only interpretation or implementation documents  
4 you will get are ones that in essence are policy documents  
5 themselves.

6 MR. HENDERSON: Just so I understand, that would  
7 preclude, for example, a message that said Ms. Adler applied  
8 for pregnancy leave, we should terminate her?

9 THE COURT: Yes.

10 MR. HENDERSON: That would not be encompassed within  
11 that?

12 THE COURT: That is correct.

13 MR. HENDERSON: OK.

14 And your question to me was how soon might we prepare  
15 all of these requests.

16 THE COURT: It is basically taking what you wrote in  
17 this December 14 letter and limiting it to legitimate policy  
18 document requests. I assume you could do it pretty quickly.

19 MR. HENDERSON: I'm getting assistance here from  
20 counsel.

21 Two points. One, I assume that the ruling today does  
22 not supersede previous documents that the Court has ordered to  
23 be produced. So this would be, you are not going back --

24 THE COURT: I have no idea what else you are talking  
25 about because when we go back to predictive coding, we'll go

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1 back to that.

2 MR. HENDERSON: No, I'm sorry. I am talking about the  
3 particular document requests that have previously been before  
4 you and you have determined that the documents should be  
5 produced. You are not reversing those. What we are talking  
6 about here is in addition to the discovery that's already been  
7 ordered.

8 THE COURT: No.

9 Whatever documents they have given you, because you  
10 had extensive discovery relating to the collective action,  
11 whatever you have, you have. Whatever I ordered produced via  
12 the predictive coding system that you have now put on hold is  
13 still on hold. Those rulings will hold, but you are not  
14 getting them until after the class is certified.

15 MR. HENDERSON: What about documents that you have  
16 ordered to be produced other than through predictive coding?

17 THE COURT: Such as?

18 MR. HENDERSON: I'm told that among the list we have,  
19 there are categories, there are some categories in there where  
20 you have already issued a ruling that they should be produced.

21 THE COURT: I assume they were produced. If not, you  
22 will have to give me something specific.

23 MR. HENDERSON: All right.

24 THE COURT: Ms. Rubenstein, why don't you just take  
25 over for a minute instead of whispering to him. You both can

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1 talk, you can tag team. I am OK with that, whatever will get  
2 us to an answer quickly.

3 MR. HENDERSON: Two things. With regard to updating,  
4 your Honor, I just wanted to be clear. The rules, of course,  
5 require seasonable --

6 THE COURT: Counsel, no. Read my lips, no.

7 Whatever you have, you have. If they make an argument  
8 in opposition to class cert. that the payroll record they gave  
9 you when we went through some of that in laborious detail is  
10 too old to show that the class should be certified, then you  
11 will come back to me and their hand will be royally slapped.  
12 Otherwise, use what you've got.

13 MR. HENDERSON: I was only trying to make this point,  
14 your Honor: That every party has the duty under the rules  
15 seasonably to supplement their responses if there's something  
16 that is different or is now incorrect.

17 THE COURT: Correct.

18 MR. HENDERSON: Correct?

19 THE COURT: Yes.

20 MR. HENDERSON: I was just talking about that, your  
21 Honor.

22 THE COURT: All right. But that is different than  
23 saying we have certain payroll information as of 2011 and now  
24 you want it as of 2013. So if they gave you a policy document  
25 previously and all of a sudden they have changed their policy,

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1 yes, they have to supplement on that. I don't think that's  
2 what you are talking about.

3 MR. HENDERSON: That is actually what I was talking  
4 about, your Honor.

5 THE COURT: So if the Janus book or whatever has  
6 changed --

7 MR. HENDERSON: If the policies have been amended or  
8 changed in any way, they would have a duty to supplement.

9 THE COURT: Put that in your request. That's the  
10 simplest way to deal with it. But policy, not lists of people  
11 and all of that nonsense.

12 MR. HENDERSON: All right, your Honor.

13 Then, with regard to the time, I think we would like  
14 at least a week to try to put this together and do a good job,  
15 your Honor.

16 THE COURT: OK. December 21.

17 Let's talk about the 30(b)(6) for a minute. One HR  
18 person, one senior exec from that organization team. What else  
19 do you think you would need?

20 MR. HENDERSON: What we have indicated, your Honor, is  
21 we would like to do a 30(b)(6) with respect to each of the  
22 three policies areas. That is, the compensation policies, the  
23 administration of those, the promotional one and the hiring  
24 policies associated with, you know, filling vacancies whether  
25 by promotion or hiring. The third would be with regard to the

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1 pregnancy leave policies. And then an HR one so that we make  
2 sure we get all the HR policies and sort of the ways in which  
3 HR intersects with the decision makers in these policy areas.

4 THE COURT: All right. So, looking at it from the  
5 policy perspective, plus HR, you have one senior exec who can  
6 handle all of that, or will it be multiple on the defense side?

7 MS. CHAVEY: Your Honor, we are going to have to  
8 determine that, but I think that the HR person and probably  
9 somebody from finance would cover many of these topics.

10 THE COURT: All right. So I am assuming two, maybe  
11 three at most, 30(b)(6) depositions.

12 So December 21 you are going to get the requests. I  
13 know we are hitting Christmas. I would like to get objections  
14 within 14 days, which gets us to about January 4.

15 Is that doable?

16 MS. CHAVEY: Yes. I do have some questions, your  
17 Honor, that I would like to ask at the appropriate time.

18 THE COURT: OK. Now is probably it.

19 MS. CHAVEY: OK. Thank you.

20 One of them is, you had directed plaintiffs' counsel  
21 to craft document requests pertaining to implementation by the  
22 senior management group. That is one characterization that we  
23 are not sure what it means in this case, because it does seem  
24 to have taken on some different people at different times. So  
25 we would like that clarified. I don't know if this is the

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1 appropriate time or that would be done in the requests  
2 themselves.

3 THE COURT: They can do that in the requests by  
4 identifying by name or by position who was in the senior  
5 management group, and/or you can do that in your response  
6 because it's really going to be an issue of who you are going  
7 to go to, to get the policies.

8 So the two sides may want to just talk about that, but  
9 we are not going to the office manager or whatever it's called.  
10 We are talking about the president, the CEO, and the people  
11 that are alleged to be the conspirers here, or whatever you  
12 want to call it, the people who instituted allegedly improper  
13 policies.

14 MS. CHAVEY: Judge, also in this conception of  
15 discovery what we want to be sure we are allowed to do to  
16 protect our clients' interests is, if there is a class  
17 certification motion that uses in support of its arguments  
18 declarations of 20 people, we would like to be able to have the  
19 opportunity to take discovery of those people.

20 They may be opt-in plaintiffs. They may be other  
21 people. We saw in connection with the conditional  
22 certification motion there were declarations submitted of  
23 people who were not within the collective action definition or  
24 frankly within the class action definition. So we don't want  
25 to be precluded from defending against whatever allegations or

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1 assertions might be made.

2 THE COURT: By the end of January. So let's put an  
3 exact date on it. By January 31 each side will identify their  
4 witnesses for the class cert. motion and op. That goes both  
5 ways. That means if you identified John H. Watson for the  
6 first time or whatever on the defense side, they get to take  
7 his deposition, even if that goes beyond our 30(b)(6)-ers, etc.

8 And you can only name people within your own control.  
9 So the defendants cannot say, you know, we are going to use  
10 Sherlock Holmes, the new CFO of MSL, because that's just a way  
11 around my ruling. But if you are going to put up certainly  
12 your plaintiffs and they haven't already been deposed or some  
13 employee that has said they will to testify for you, then they  
14 will be fair game for deposition.

15 MS. CHAVEY: By the same token, your Honor, if there  
16 is say let's say an opt-in plaintiff who submits a declaration  
17 or is identified as anticipated to submit a declaration in  
18 support of the class certification motion, if we don't know  
19 that until January 21, we might not know to list, for example,  
20 that person's manager or somebody else who may be related to  
21 the allegations that that person makes.

22 THE COURT: You will each get a little chance within  
23 two or three days to do a rebuttal list of that because the  
24 30(b)(6) depositions will still be going on at that point  
25 anyway. We will give you a week, so that's February 7 to do

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1 any further responsiveness, cleanup, whatever it may be.

2 MS. CHAVEY: Your Honor, as Mr. Henderson has advised  
3 the Court, the parties do agree to proceed with discovery on  
4 the Equal Pay Act claims. We would like to prepare our motion  
5 for decertification of the collective action. So we would like  
6 to proceed on a parallel track really to the Title VII class  
7 action. We would like to proceed with discovery on the Equal  
8 Pay Act claims.

9 THE COURT: Is that going to then open up that they  
10 need discovery of you on the Equal Pay Act claims?

11 MS. CHAVEY: We anticipate that it will, as  
12 Mr. Henderson alluded to, we were discussing before Judge  
13 Carter earlier today our position that because six of the  
14 opt-in plaintiffs have signed releases of all claims --

15 THE COURT: Is that all we are talking about, the  
16 release issue, or --

17 MS. CHAVEY: Not exactly, because Judge Carter held  
18 that those issues should wait until a summary judgment motion.  
19 So, rather than decide issues just relating to that discrete  
20 issue now, he ruled that that would be considered only at the  
21 end of really full-blown discovery.

22 THE COURT: I am going to put a pin in that, because  
23 on the one hand you are each saying you agree, on the other, I  
24 have my doubts, both because of the general nature of this case  
25 and because they may agree that you can take discovery, but

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1 that's going to just open the door that they need discovery as  
2 well, I think. But if you can work it out so that there is  
3 efficiency here, either to go simultaneous with this or  
4 obviously there will be a period of time while the class cert.  
5 motion is being briefed and then is under consideration by  
6 Judge Carter, that might be a good time for this.

7 If you all can agree -- emphasis on agree -- on a way  
8 to do this that is not going to put us back into the doing  
9 predictive coding or key word searching or whatever twice, I'm  
10 OK with that.

11 I really do like to move cases along. This case is an  
12 exception because -- I will leave it as because. Work with  
13 Mr. Henderson and Ms. Rubenstein. If you can actually reach an  
14 agreement on that you will report back to me in writing that  
15 there is such an agreement and what it is and we'll go from  
16 there.

17 If you can't, I will probably say we are not going to  
18 do that now, but we'll see how that plays out.

19 MS. CHAVEY: Judge, we would also ask the Court to  
20 indicate how many document requests the plaintiffs are  
21 permitted to prepare.

22 THE COURT: How many is useless. The real issue is --  
23 I mean? How many policies do you have. If we are limiting  
24 it --

25 MS. CHAVEY: We believe we have produced them all.

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1 THE COURT: I understand that, which is why this all  
2 may be going in circles. Therefore whether they ask you in one  
3 document request that says, please give me all policy documents  
4 about promotion, pay, hiring and pregnancy leaves and the FMLA  
5 and/or break that down into 5 or 50 it doesn't much matter. So  
6 you all may want to talk further about this.

7 MS. RUBENSTEIN: Your Honor, I have just one question  
8 for clarification, because at the last hearing in the context  
9 of the predictive coding discussion, and recognizing that  
10 because we are currently representing opt-ins, including  
11 current employees, the date was moved up.

12 I believe your Honor said a few moments ago that with  
13 respect to any new document requests that what we've got is  
14 what we've got, to use your Honor's words. I think I would  
15 like to clarify that.

16 I think that was the defendants' suggestion that the  
17 date was moved up to, the operative date to November 2012, I  
18 believe in terms of what the documents, the discovery that we  
19 would be entitled to for our opt-ins.

20 THE COURT: I am not sure what you're referring to.

21 Ms. Chavey?

22 MS. CHAVEY: Judge, the plaintiffs had presented an  
23 argument months ago that the document requests on MSL should be  
24 considered to have an end date that was moving.

25 Your Honor ruled that the documents that needed to be

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1 produced would have an end date of February of 2011, when the  
2 lawsuit was filed. The plaintiffs appealed that discovery  
3 ruling to Judge Carter, who upheld your ruling.

4 We have not indicated that we think that the date  
5 should be moved up. It would be a never-ending target if we  
6 keep moving it up. The fact that there are opt-ins in the case  
7 doesn't change that as far as the Title VII policy-based  
8 challenges that the plaintiffs are making.

9 THE COURT: I am not sure what you are asking me,  
10 Ms. Rubenstein. Can you be a little clearer.

11 MS. RUBENSTEIN: Yes.

12 My recollection, I think it's very specific, is that  
13 we discussed the fact that we have current employees. We are  
14 currently representing women who are working there. And to the  
15 extent we are entitled to discovery that is relevant to them, I  
16 believe my understanding was that the Court agreed and the  
17 defendants agreed --

18 THE COURT: Whatever I ruled, that's the joy of the  
19 transcript. It is there. If what you are saying is you want  
20 any of that discovery now, the answer is no. We are doing  
21 class discovery subject to whatever else you all agree on on  
22 individual party discovery, equal Pay Act or anything else.

23 In addition, you said you may be amending the  
24 complaint to assert Title VII claims for some of the opt-ins.  
25 If you are going to do it as a fallback or anything else, let's

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1 do it.

2 MR. HENDERSON: On that issue, your Honor, just very  
3 briefly, the rule is that the pendency of the class action  
4 initiated by Ms. Da Silva tolls the statute for any putative  
5 class member. If class is denied, then it begins to run again  
6 and they have the choice of pursuing an individual case. We  
7 don't intend on pursuing the individual cases of the plaintiffs  
8 that got it. They are putative class members. They are  
9 parties.

10 THE COURT: All right.

11 MR. HENDERSON: They have Title VII claims. That's a  
12 class thing, but they are not asserting them individually.

13 THE COURT: I take it your saying if class  
14 certification is denied, you may amend at that point or you may  
15 not.

16 MR. HENDERSON: They have the choice at that point to  
17 pursue their individual claims or not.

18 THE COURT: All right.

19 Since we are not doing discovery on individual claims,  
20 it doesn't much matter. If you take objections to Judge Carter  
21 and this gets turned around in any way, then we will have to  
22 see what we are doing on that.

23 At the moment I guess we will find out within 14 days  
24 what you are doing. If you want to tell me now, that's fine,  
25 because I would probably stay everyone's obligations while you

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1 deal with Judge Carter on this just in terms of efficiency. If  
2 you want to wait and ask for that on the 14th day or whenever  
3 you decide to file the objections, that's OK, too.

4 MR. HENDERSON: In that regard, your Honor, I mean,  
5 first of all, I don't know as I stand here now. We have to  
6 evaluate this and see.

7 THE COURT: OK.

8 MR. HENDERSON: In connection with evaluating that,  
9 we, of course, have a transcript of the proceedings today. I  
10 guess my question is, do you intend to memorialize your rulings  
11 in an order?

12 THE COURT: No.

13 MR. HENDERSON: In a written order.

14 THE COURT: No, unless I tell you otherwise. Because  
15 on predictive coding there is a greater good perhaps or a  
16 greater bad to having written opinions out there, so that  
17 whatever is done is accurately out there as opposed to what  
18 some bloggers do with it. There I might be inclined, even  
19 after a ruling from the bench, to issue a written opinion or  
20 order.

21 For the run-of-the-mill discovery, as I told your  
22 predecessor, Ms. Wipper, in the first and second hearings, the  
23 transcript rules, and the 14 days calendar days issue begins  
24 running immediately from the conference time, regardless of how  
25 long it takes you to get the transcript.

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1 So within 14 business days of today, which is probably  
2 the 28th of December, if you want to file objections with Judge  
3 Carter, go right ahead.

4 MR. HENDERSON: I just wanted to make sure. In  
5 evaluating your ruling today, we have the transcript, that's  
6 it.

7 THE COURT: Yes.

8 MR. HENDERSON: OK.

9 THE COURT: That is correct.

10 Anything else other than we are going to pick a  
11 January date?

12 MS. CHAVEY: Two other things I would like to raise,  
13 your Honor.

14 One is on the issue of the potential individual Title  
15 VII claims of the opt-in plaintiffs, plaintiffs' counsel at the  
16 last conference had suggested that they may be asserting those  
17 claims or would be --

18 THE COURT: What Mr. Henderson just said is they are  
19 holding off on that until class certification.

20 MS. CHAVEY: What we would ask, on the individuals who  
21 are represented by plaintiff's counsel, unlike another absent  
22 class member who is not represented by plaintiffs' counsel, we  
23 would ask the Court, those are the people who asserted Equal  
24 Pay Act claims, we would ask the Court not to, in other words,  
25 to order that the tolling that would otherwise apply to those

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1 people on their individual Title VII claims doesn't apply,  
2 because what we have otherwise is the specter of individuals  
3 with Equal Pay Act claims and --

4 THE COURT: Mr. Chavey, maybe I'm missing something,  
5 but absent either of you filing objections to what I have just  
6 done, we are having limited class certification discovery.

7 We are then going to stop everything except what you  
8 all agree on while Judge Carter decides the class cert. motion.  
9 If he grants the class cert. motion, what I understand  
10 Mr. Henderson is saying is the opt-in EPA plaintiffs are no  
11 different than the absent class members. They are covered by  
12 the Title VII class action.

13 If class certification is denied, then they are also  
14 similar to everybody else out there except they are a little  
15 closer to the party, and they will either assert their  
16 individual claims then, and you will certainly remind me, and  
17 we will make sure that's done before we go back into predictive  
18 coding mode so we know who has an individual Title VII claim  
19 and who doesn't. Unless I'm missing something, I think the  
20 issue you are raising is largely moot.

21 MS. CHAVEY: The only point that I was making is that  
22 those individuals are not like any other putative class member  
23 because they are represented by class counsel on the Equal Pay  
24 Act claims.

25 THE COURT: So? If you want to give me some case law  
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1 that says that you want me to rule now that they don't have a  
2 further toll or they would have had the toll up through either  
3 their opt-in date or when you make your motion, it seems like  
4 an entire waste of time. But if there is case law that says  
5 they are different folks and it's worth making a motion, you  
6 will make the motion, although I think that motion, if it's  
7 substantive, goes to Judge Carter. So if you want to bother  
8 him with that motion, do what you need to do to get his  
9 permission.

10 MS. CHAVEY: Thank you.

11 The last issue is we would just ask the Court to set a  
12 briefing schedule for the class certification.

13 THE COURT: It is kind of hard to do because we have  
14 to finish the 30(b)(6) depositions. As soon as I know that  
15 document production is complete, which I am assuming is going  
16 to be January 21 or sooner, and you then tell me and you have  
17 now scheduled the two, three, 30(b)(6) depositions, we'll then  
18 set a date for when there have to be any follow-up document  
19 requests based on the 30(b)(6) depositions, and they better be  
20 very targeted and specific.

21 Then when that's done we'll set a date for the motion  
22 schedule. It's kind of premature to do that now.

23 MR. EVANS: Your Honor, if I may, I want to clarify  
24 those rulings with respect to the scope of the discovery apply  
25 to Publicis group as well? My own position, and I stated this

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1 to Mr. Henderson before, particularly in light of the scope we  
2 have identified here today, is that that has all been done as  
3 part of the jurisdictional discovery issues. We produced  
4 policies kept back and forth and we have already had a  
5 deposition on those policies.

6 To the extent they want to include additional  
7 information on Publicis, I assume that would fall under the  
8 same schedule.

9 THE COURT: It would. Although I can't imagine that  
10 there is anything else. Is there anything like that  
11 contemplated?

12 MR. HENDERSON: Your Honor, what we had agreed when we  
13 spoke last week or this week.

14 MR. EVANS: It was Wednesday, two days ago.

15 MR. HENDERSON: A couple of days ago. Because the  
16 decision just came down, we've got to go back and take a look  
17 at what we have requested and what remains outstanding. My  
18 understanding is that the discovery that was permitted against  
19 Publicis was very -- it was specifically defined as those going  
20 to jurisdictional issues.

21 THE COURT: Yes.

22 MR. HENDERSON: So I assume that.

23 THE COURT: The other issue here is you're largely --  
24 I am not sure what the term is, you're largely having them in  
25 here as the deep pocket, not that a deeper pocket is needed,

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1 but that they are running MSL and they are the employer in that  
2 context.

3 I doubt that there is much that you need that you  
4 don't already have for class certification, because the class  
5 are employees of MSL however much they are affected by  
6 Publicis' policies, but if you need to Publicis policy  
7 documents, you know, as to how they're treating MSL and only  
8 MSL, meaning not how they're treating the XYZ affiliate, ask  
9 for it, but it will be on this schedule.

10 MR. HENDERSON: Well, that was going to be my next  
11 question, whether we could have a little more time with respect  
12 to Publicis, because this is all new since the judge issued --

13 THE COURT: No. It's policies. If they have any  
14 policy documents about pregnancy leave at MSL, if you haven't  
15 already gotten that, ask for it. I don't understand what else  
16 you might want, and I'm trying to keep this moving.

17 MR. HENDERSON: I think in addition to the policy  
18 documents, the record, I believe, reflects that, in fact,  
19 Publicis executives were actually making and approving  
20 decisions with regard to compensation for class members.

21 So it is not just the overarching policies. They are  
22 among the decision makers that I think you referred to. That  
23 is, the people that the complaint alleges were making the  
24 discriminatory decisions.

25 THE COURT: Right.

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1 MR. HENDERSON: So it's not just whatever policies  
2 they have, but in fact their actions in doing this.

3 THE COURT: Again, it's going to be policy oriented,  
4 not individual. The fact that they approved a pay raise for  
5 Mr. X and didn't approve it for Ms. Z who is not a plaintiff,  
6 we are not doing this as if it's full-blown, everything  
7 discovery. You are going to get their policy decisions as to  
8 why they did what they did with MSL, and we are going to move  
9 on.

10 MR. HENDERSON: Thank you.

11 MR. EVANS: Your Honor, I would only point out that's  
12 all been done. We answered discovery with respect to all of  
13 that. We had a 30(b)(6) deponent who talked about the approval  
14 process at a high level. Insofar as the requests are  
15 duplicative, I assume we are not expected to do it again.

16 THE COURT: That is correct --

17 MR. EVANS: Thank you, your Honor.

18 THE COURT: -- unless there is something new or  
19 different since.

20 So, with the objections coming in January 4, let's  
21 give you a day or two to try to get together and work anything  
22 out that can be worked out. How about either the afternoon of  
23 January 8 or the morning of the 9th does that give you enough  
24 time.

25 The problem is I am unavailable the 10th and 11th, and  
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1 by the 14th we're getting much too close to when documents have  
2 to be produced for my comfort level.

3 MR. HENDERSON: Your Honor, forgive me. Without my  
4 telephone, which has my calendar, I'm a bit adrift can you just  
5 state the days of the week.

6 THE COURT: Yes. Tuesday, January 8, Wednesday,  
7 January 9. Otherwise, we go over to the week starting Monday,  
8 January 14, but that's kind of late. I apologize that you  
9 can't have your phone. We have certain policies here, not by  
10 unanimity but by majority vote, that your New York colleagues  
11 can bring their phone in if they've got the right pass, but you  
12 can't. We have a certain sense of paranoia around here in  
13 certain ways.

14 MR. HENDERSON: I have just gotten used to using it as  
15 my calendar.

16 MR. BRECHER: That is an implementation so we don't --

17 THE COURT: Ms. Rubenstein, based on your calendar,  
18 the 8th? The 9th? What is your pleasure?

19 MS. RUBENSTEIN: It doesn't matter to me.

20 THE COURT: OK. 2 o'clock on January 8.

21 MS. CHAVEY: Your Honor, I'm not going to be able to  
22 be here that day, so if I could be excused from that  
23 conference.

24 THE COURT: Unless the 9th works better for you.

25 MS. CHAVEY: It doesn't.

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1 THE COURT: OK.

2 MS. CHAVEY: Thank you.

3 THE COURT: If you can get your objections in earlier  
4 than the 4th, you know, I don't want to totally destroy  
5 everyone's potential holiday period, but the more time you have  
6 all to discuss it between the requests on the 21st of December  
7 and when you're seeing me on the 8th, you know, I would hope  
8 that you will be able to work out things that are work out-able  
9 and not say that you didn't have enough time or whatever.

10 MS. CHAVEY: Your Honor, I just want to make sure I  
11 didn't miss something. On the 8th will you set a date for  
12 production of the documents that are required.

13 THE COURT: No. The documents are due January 21  
14 unless that is a holiday, which it might be.

15 MS. CHAVEY: OK.

16 THE COURT: I think that's Martin Luther King Day, so  
17 I guess you earn an extra day out of that.

18 Documents, certainly the documents to which there were  
19 no objections I expect to be done then.

20 If there is, you know, too much to do between the 8th  
21 and the 22nd, we will see, but I'm anticipating full and  
22 complete document production on January 22, because I don't  
23 think we are talking about too many documents. I think it's  
24 mostly going to be a question of you making sure you have  
25 talked to your quote-unquote control group or whatever you want

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1 to call it and making sure that you have anything that could  
2 possibly be considered a policy document or a high-level  
3 interpretation or implementation on a general scale and make  
4 sure you get all that to the plaintiffs.

5 In addition, this may all become moot depending on  
6 what happens between now and 14 days from now.

7 All right.

8 Anything else from either side?

9 MR. HENDERSON: I don't believe so, your Honor.

10 MS. CHAVEY: No, thank you, your Honor.

11 THE COURT: All right. The usual drill.

12 Both sides are required to purchase the transcript,  
13 and happy holidays, all.

14 I'll see you in January.

15 (Adjourned)  
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